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**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

STANDARD INNOVATION CORP.,

Plaintiff,

v.

LELOI AB, ET AL.,

Defendants.

Case No. 5:15-cv-04858-BLF

**REVISED JOINT CASE MANAGEMENT
STATEMENT AND ~~PROPOSED~~ ORDER**

Judge: Hon. Beth Freeman
Date: December 17, 2015
Time: 11:00 am
Courtroom: 3, 5th Floor

Pursuant to Federal Rule of Civil Procedure 26(f), Civil Local Rule 16-9, this Court's "Standing Order Re Civil Cases" ¶ C.2., and the "Standing Order for All Judges of the Northern District of California – Contents of Joint Case Management Statement," Plaintiff Standard Innovation Corp. ("Standard Innovation") and Defendants LELOi AB, and LELO Inc.

(collectively “LELO Defendants”)¹ respectfully submit this Revised Joint Case Management Statement and Proposed Order in the connection with the Case Management Conference (“CMC”) in this matter pursuant to the Court’s instruction during the Case Management Conference on December 17, 2015.

1. JURISDICTION AND SERVICE

This is a case for patent infringement arising under the patent laws of the United States, 35 U.S.C. § 101 *et seq.* The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a) and the Patent Laws of the United States, 35 U.S.C. § 1, *et seq.* In addition, in connection with its counterclaims, the LELO Defendants have invoked this Court’s jurisdiction under 28 U.S.C. §§ 1367(a), 2201 and 2202.

Defendants LELOi AB and LELO Inc. have answered and appeared and do not challenge subject matter jurisdiction, but make no representations on behalf of any other named defendant.

Foreign defendants LELO (Shanghai) Trading Co., Ltd., and Suzhou Armocon Technology Co. (collectively, “Foreign Defendants”) have not yet been served nor have they appeared; however, Standard Innovation’s Motion for Order Permitting Service of Foreign Defendants Pursuant to Fed. R. Civ. Pro. 4(h)(2) is currently pending (Doc. No. 111). The LELO Defendants oppose this motion.

One additional defendant sought to be added by Standard Innovation’s proposed Second Amended Complaint, Intimina, Inc., has not yet been served, and service is subject to Standard Innovation’s pending Motion for Leave to File Second Amended Complaint (Doc. No. 83), which is opposed by the LELO Defendants (Doc. No. 96).

2. FACTS

A. Brief Description of the Facts

This is a patent infringement case related to the ITC investigation, *In the Matter of Certain Kinesiotherapy Devices and Components Thereof*, Inv. No. 337-TA-823. Plaintiff Standard

¹ The only defendants who have answered or appeared are LELOi AB and LELO Inc. Throughout this Statement, “LELO Defendants” only refers to Defendants LELOi AB and LELO Inc. LELOi AB and LELO Inc. make no representations on behalf of any other named defendant.

1 Innovation alleges that the LELO Defendants infringe (and have infringed) U.S. Patent No. 7,931,
2 605 (“the ’605 Patent”) by making, using, offering to sell, selling, and importing into the United
3 States certain couples massager devices. In its Final Determination, the ITC found that some of
4 LELO Defendants’ products infringed the ’605 Patent while other products did not infringe, and
5 that the prior art presented by the respondents in the ITC proceeding did not render the patent
6 invalid. Having found infringement, the ITC issued cease and desist orders as well as a General
7 Exclusion Order banning the importation into the United States, selling, or selling after
8 importation any infringing products. The ITC’s orders went into effect on August 17, 2013. The
9 LELO Defendants appealed the ITC’s Final Determination to the Court of Appeals for the Federal
10 Circuit on multiple grounds. On appeal, the Federal Circuit reversed the ITC’s Final
11 Determination holding that Standard Innovation had not met the economic prong of the domestic
12 industry requirement under Section 337 (a quasi-jurisdictional requirement unique to the ITC).
13 The Federal Circuit did not address the non-infringement and invalidity issues raised on appeal.
14 Due to the Federal Circuit’s reversal, the ITC rescinded its General Exclusion Order and cease and
15 desist orders on July 21, 2015.

16 On October 21, 2013, the LELO Defendants filed a request for *ex parte* reexamination of
17 the ’605 Patent in the USPTO challenging the validity of most claims of the ’605 Patent. The
18 USPTO granted the request on November 22, 2013, but ultimately confirmed the patentability of
19 all challenged claims without requiring any amendments to the claims.

20 On August 4, 2015, the parties timely filed a Joint Status Report and the stay was
21 effectively lifted the following day. On August 26, 2015, Standard Innovation amended its
22 complaint to add foreign defendants LELO (Shanghai) Trading Co., Ltd., and Suzhou Armocon
23 Technology Co. Standard Innovation filed a Motion for Leave to File a Second Amended
24 Complaint to add Intimina, Inc., as a party on October 9, 2015 (Doc. No. 83).

25 On October 21, 2015, the United States District Court for the Southern District of Texas
26 granted LELO Defendants’ motion to transfer (Doc. No. 85) and this case was transferred to this
27 District on October 23, 2015 (Doc. No. 86).

The LELO Defendants allege that they do not infringe any claim of the '605 Patent, and that the '605 Patent is invalid. In addition, the LELO Defendants have asserted counterclaims for a declaratory judgment of non-infringement and invalidity of the claims of the '605 Patent.

B. Principal Factual Issues which the Parties Dispute

Based on the current pleadings, the principal factual issues in dispute are:

- (1) Whether the accused products infringe one or more of the claims of the '605 Patent.
- (2) Whether the '605 Patent is valid.
- (3) Whether the '605 Patent is unenforceable for inequitable conduct.
- (4) If Standard Innovation is entitled to damages, the amount of Standard Innovation's damages for any infringement of a valid claim of the '605 Patent.

3. LEGAL ISSUES IN DISPUTE

The principle legal issues in dispute are:

- (1) The proper construction of the disputed terms in the asserted claims of the '605 Patent.
- (2) Whether the LELO Defendants have been or are now infringing the '605 Patent.
- (3) Whether Standard Innovation is entitled to a permanent injunction enjoining the LELO Defendants from further infringement.
- (4) Whether the '605 Patent is valid under 35 U.S.C. §§ 101, 102, 103, and/or 112.
- (5) Whether the '605 Patent is unenforceable for inequitable conduct before the USPTO during prosecution and during *ex parte* reexamination.
- (6) Whether any party is entitled to costs and attorneys' fees under 35 U.S.C. § 285.
- (7) Whether this case is exceptional pursuant to 35 U.S.C. § 285, entitling any party to recovery of attorneys' fees, costs, and expenses incurred in prosecuting this case.

4. MOTIONS

Standard Innovation has two pending motions at this time, including Motion for Leave to File Second Amended Complaint (Doc. No. 83) and Motion for Order Permitting Service under F.R.C.P. 4(h)(2) (Doc. No. 111).

1 **5. AMENDMENT OF PLEADINGS**

2 Standard Innovation does not currently know whether amendments to the pleadings will be
3 required beyond those proposed in Standard Innovation's Motion for Leave to File Second
4 Amended Complaint (Doc. No. 83).

5 The LELO Defendants anticipate amending the pleadings to add an additional affirmative
6 defense of inequitable conduct.

7 **6. EVIDENCE PRESERVATION**

8 Standard Innovation and the LELO Defendants certify they have reviewed the Guidelines
9 Relating to the Discovery of Electronically Stored Information ("ESI"), and confirm they have met
10 and conferred pursuant to Fed. R. Civ. P. 26(f) regarding reasonable and proportionate steps taken
11 to preserve evidence relevant to the issues reasonably evident in this action.

12 **7. DISCLOSURES**

13 Pursuant to Fed. Rule of Civ. P. 26(f), Standard Innovation and the LELO Defendants
14 conferred telephonically on September 15, 2015 prior to this case's transfer to this District.

15 Standard Innovation and the LELO Defendants agree to exchange initial disclosures on
16 January 6, 2016, and will make further disclosures in compliance with P.L.R. 3-1 – 3-4.

17 **8. DISCOVERY**

18 **A. Discovery Taken to Date**

19 Standard Innovation and the LELO Defendants held their Rule 26(f) Conference prior to
20 this case's transfer to this District on September 15, 2015.

21 Discovery Subjects: The general subjects on which discovery will be needed include the
22 factual issues in dispute above, and include the alleged infringement of the '605 Patent;
23 conception, ownership, and prosecution of the '605 Patent; the nature and operation of the accused
24 products; invalidity and enforceability of the '605 Patent; any licensing of the '605 Patent; and
25 alleged damages.

26 Standard Innovation and the LELO Defendants have agreed to the following limitations:

27 (a) Depositions: Standard Innovation and the LELO Defendants propose that the
28 parties comply with the discovery limitations agreed to in the parties' initial Case Management

Conference Statement (Doc. No. 58). Standard Innovation and the LELO Defendants also reserve all rights to seek further modifications of the limits set under the applicable rules and agree to confer in good faith if a need arises for additional discovery.

(b) Expert Discovery: Standard Innovation and the LELO Defendants agree that the limits on expert discovery set forth in Fed. R. Civ. P. 26(b)(4)(B) and (C) shall be enforced in this matter. Standard Innovation and the LELO Defendants stipulate that counsel need not preserve drafts of expert reports (partial or complete), notes and other evidence of communications with experts on the subject of the expert's actual or potential testimony, provided, however, that this Paragraph 8.A(b) shall not apply to any communications or documents that the expert relied upon in forming his or her opinion as expressed in an affidavit, report, or testimony in connection with this civil action, or on which the expert intends to rely as a basis for an opinion expressed in an affidavit, report, or testimony in connection with this civil action. Such communications or documents shall be subject to discovery and (to the extent otherwise admissible) to inquiry at trial. In addition, discovery concerning an expert's compensation is permissible.

(c) Interrogatories: Standard Innovation and the LELO Defendants agree that pursuant to Fed. R. Civ. P. 33 each party is limited to serving on any other party no more than 25 written interrogatories, including all discrete subparts.

(d) Requests for Admissions: Each party may propound a maximum of 50 requests for admission on topics other than the authenticity of documents. There will be no limit on the number of requests for admission as to the authenticity of documents.

(e) Privilege log: Neither party shall be required to log privileged materials that post-date the December 2, 2011 filing of Standard Innovation's Complaint in this matter.

B. Scope and Phasing of Anticipated Discovery

Standard Innovation and the LELO Defendants intend to pursue discovery in the form of requests for documents and other things, interrogatories, depositions, and all forms of discovery authorized by the Federal Rules. Standard Innovation and the LELO Defendants may seek third-party discovery.

Standard Innovation and the LELO Defendants do not believe that discovery should be phased with two exceptions: (1) Standard Innovation and the LELO Defendants agree to the phasing of email discovery set forth in the Northern District of California Model Stipulated Order regarding Discovery Of Electronically Stored Information For Patent Litigation; and (2) Standard Innovation and the LELO Defendants agree that fact discovery should be complete before expert reports are due and expert discovery commences.

C. Electronically Stored Information

Standard Innovation and the LELO Defendants agree that the case be governed by the Northern District of California “Model Stipulated Order regarding Discovery of Electronically Stored Information for Patent Litigation.”

D. Issues Regarding Claims of Privilege and Work Product

Standard Innovation and the LELO Defendants agree that Fed. R. Civ. P. 26(b)(5)(B) shall be enforced in this matter, and agree that the Court should enter an order governing non-waiver of privilege due to inadvertent disclosure of privileged information. Standard Innovation and the LELO Defendants will negotiate a proposed provision and include it in the proposed Protective Order that Standard Innovation and the LELO Defendants expect to submit to the Court.

The only defendants who have answered or appeared are LELOi AB and LELO Inc., and LELOi AB and LELO Inc. make no representations on behalf of any other named defendant.

E. Stipulated Protective Order

Standard Innovation and the LELO Defendants agree that a stipulated protective order should be entered and further agree to use the Northern District of California model order for patent cases involving highly-sensitive materials as their model, with certain agreed upon modifications tailored to this case. Standard Innovation and the LELO Defendants expect to submit a proposed stipulated Protective Order for the Court’s consideration shortly.

F. Email Service Agreement

Standard Innovation and the LELO Defendants have agreed to accept service of discovery requests, discovery responses, expert reports and other documents that are not served through the ECF system (for example, sealed pleadings) by email. Hard copies will be provided by overnight

mail upon request by the receiving party. Standard Innovation and the LELO Defendants further agree to accept service by other reasonable electronic means, such as by an email providing access to the documents on an ftp site or through online services such as DropBox or Secure FTP, so long as the sender provides instructions on how to access the documents. Standard Innovation and the LELO Defendants further agree that a document is deemed served on a particular day if it (or an email providing access to it) is received by midnight Pacific Time on that calendar day (provided that the sender does not receive any indication that the email transmission was unsuccessful). Standard Innovation and the LELO Defendants will meet and confer regarding service lists, but in the absence of any additional agreement, Standard Innovation and the LELO Defendants will serve counsel of record who are deemed to have consented to electronic service.

9. CLASS ACTIONS

Not applicable.

10. RELATED CASES

None.

11. RELIEF

Plaintiff's Request: Standard Innovation seeks money damages for the LELO Defendants' infringement of Standard Innovation's '605 Patent, together with prejudgment interest and a permanent injunction barring Defendants and all their affiliates from further acts of infringement and an award of reasonable attorneys' fees, expenses, costs, and prejudgment interest based on a finding that this case is exceptional under 35 U.S.C. § 285.

Defendants' Request: The LELO Defendants seek a judgment denying Standard Innovation all relief requested, a declaration of non-infringement and invalidity, an award of prejudgment and post-judgment interest and costs, and attorneys' fees based upon a finding that this case is exceptional under 35 U.S.C. § 285.

12. SETTLEMENT AND ADR

In the related ITC investigation (337-TA-823), Standard Innovation and the LELO Defendants participated in three mandatory settlement conferences, none of which resulted in resolution of any disputes.

1 In *Lelo Inc. v. Standard Innovation Corp. et. al*, LELO Inc. and Standard Innovation
2 Corporation and Standard Innovation (US.) Corp. participated in a mandatory in-person settlement
3 meet-and-confer in August 2015 and a mandatory settlement conference in September 2015,
4 during which those parties discussed settling all disputes between them. The parties have not been
5 able to reach resolution. The next settlement conference in that case is scheduled for March 8,
6 2016. The parties' principals plan to discuss potential settlement of all disputes either by phone or
7 in person before then. Based on prior settlement discussions, Standard Innovation and the LELO
8 Defendants believe a prompt settlement is unlikely.

9 Standard Innovation and the LELO Defendants will file a Stipulated Agreement to ADR
10 by April 1, 2016 (Doc. No. 127) or request the Court's assistance on this issue if a stipulation
11 cannot be reached.

12 **13. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

13 Standard Innovation and the LELO Defendants respectfully decline the appointment of a
14 Magistrate Judge for all purposes.

15 **14. OTHER REFERENCES**

16 Standard Innovation and the LELO Defendants do not believe the case is suitable for
17 reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

18 **15. NARROWING OF ISSUES**

19 Standard Innovation and LELO Defendants believe that issues of infringement and
20 invalidity may be narrowed by claim construction and summary judgment motions.

21 **16. EXPEDITED SCHEDULE**

22 Not applicable (Doc. No. 127).

23 **17. SCHEDULING**

24 Standard Innovation and the LELO Defendants propose the schedule in the attached
25 Appendix A.

18. TRIAL

The trial will be a jury trial. Standard Innovation anticipates it will take approximately 3-4 full court days to present its evidence at trial. LELO Defendants anticipate it will take approximately 5-7 full court days to present their evidence at trial.

19. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

Standard Innovation and the LELO Defendants have filed the "Certification of Interested Entities of Persons" required by Civil Local Rule 3-16 (Docket Item Nos. 2, 42, 43).

20. PROFESSIONAL CONDUCT

All attorneys of record for Standard Innovation and the LELO Defendants have reviewed the Guidelines for Professional Conduct for the Northern District of California.

DATED: January 6, 2015

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APPENDIX A – ~~PROPOSED~~ SCHEDULE

Event	Date
Disclosure of Asserted Claims and Infringement Contentions (Patent L.R. 3-1, 3-2)	December 31, 2015 [14 days after initial CMC - PLR 3-1]
Invalidity Contentions (Patent L.R. 3-3, 3-4)	February 15, 2016 [45 days after Disclosures of Asserted Claims and Infringement Contentions - PLR 3-3]
Proposed claim terms for construction (Patent L.R. 4-1) – Standard Innovation proposes no more than two terms per side, LELO Defendants propose no more than five terms per side	February 29, 2016 [14 days after service of Invalidity Contentions - PLR 4-1]
Deadline for Parties to File Stipulated Schedule to Reduce Claims	March 1, 2016 Case Management Order (Doc. No. 127)
Parties exchange Preliminary Claim Constructions and identify supporting evidence and experts (Patent L.R. 4-2)	March 21, 2016 [21 days after exchange of proposed terms - PLR 4-2]
Deadline for Parties to File Stipulated Agreement to ADR	April 1, 2016 Case Management Order (Doc. No. 127)
Joint Claim Construction and Prehearing Statement (Patent L.R. 4-3)	April 15, 2016 [60 days after service of Invalidity Contentions - PLR 4-3]
Close of Claim Construction Discovery (Patent L.R. 4-4)	May 16, 2016 [30 days after filing JCCPS - PLR 4-4]
Deadline to Amend Pleadings	July 29, 2016
Plaintiff's Opening Claim Construction Brief due (Patent L.R. 4-5)	May 31, 2016 [45 days after filing JCCPS - PLR 4-5]
Defendants' Opposition Claim Construction Brief due (Patent L.R. 4-5)	June 14, 2016 [14 days after opening brief - PLR 4-5]

Plaintiff's Reply Claim Construction Brief due (Patent L.R. 4-5)	June 21, 2016 [7 days after opposition briefs - PLR 4-5]
Claims Construction Technology Tutorial (Patent L.R. 4-6)	Oct. 28, 2016 at 9:00 a.m. Case Management Order (Doc. No. 127)
Claim Construction Hearing (Patent L.R. 4-6)	Nov. 4, 2016 at 9:00 a.m. Case Management Order (Doc. No. 127)
Deadline for settlement conference	Within 30 days of Claim Construction Ruling
Close of Fact Discovery	60 days after Claim Construction Ruling
Opening expert reports due	90 days after Claim Construction Ruling
Rebuttal expert reports due	120 days after Claim Construction Ruling
Close of expert discovery	150 days after Claim Construction Ruling
Deadline for dispositive motions to be filed	30 days after close of expert discovery
Last Day to Hear Dispositive Motions	June 1, 2017 at 9:00 a.m. Case Management Order (Doc. No. 127)
Final Pretrial Conference	Aug. 31, 2017 at 1:30 p.m. Case Management Order (Doc. No. 127)
Trial	Sept. 25, 2017 at 9:00 a.m. Case Management Order (Doc. No. 127)

